No. 88-191

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

LOUISIANA POWER & LIGHT COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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Faced with the inescapable fact that the state court judgment they seek to uphold deviates substantially from the federal standard of liability, Respondents Louisiana Power & Light Company ("LP&L"), City of New Orleans ("City") and Louisiana Public Service Commission ("LPSC") urge denial of certiorari on the grounds that the state courts complied with the spirit, if not the letter, of the federal standard and, in the alternative, that any failure of compliance is not sufficiently important to warrant this Court's review. In so doing, Respondents distort the decisions in question.

1. Respondents' first tack in attempting to show that the federal standard of liability presents no conflict with the

standards applied by the Louisiana Court of Appeal is to misrepresent the federal standard. The City argues that the federal interest is satisfied by a determination of "fault *or* negligence" and that, in making such determination, "a state standard rather than a uniform federal standard is applicable." Br. 13, emphasis added. LP&L contends that the standard is "contract fault drawn from the states' laws of negligence and fault." Br. 19. But if one thing is clear from the Fifth Circuit's opinion, it is that "the Commission *has* articulated a uniform federal standard of liability" and that "[t]his standard uniformly means that a customer must establish United's negligence or greater misconduct in causing a foreseeable shortage in order to recover damages." App. G. 180a, emphasis in original.

Thus, it is clear that the federal interest as articulated by the Commission and as reviewed by the Fifth Circuit will not permit contract liability for curtailment to be imposed upon United unless there has been a finding of negligence. Yet, despite repeated urging by Respondents themselves,[1] there was *no* finding that United was negligent by either the Louisiana trial court or the Court of Appeal. In an effort to create a finding where none exists, Respondents in some instances have misquoted the court opinions.[2]

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1 As a vivid example, the LPSC makes reference to specific findings of the trial court (Br. 8-9) concerning actions of United it asserts to be the equivalent of negligence. What it fails to note is that these findings were based on the LPSC's proposed findings of fact submitted to the trial court with the significant exception that LPSC proposed a finding that such conduct was "negligent" and the trial court -- while adopting the remainder of the proposed finding -- deleted the request for a finding of negligence!

2 The City asserts in its brief (p. 16):

> The Louisiana Fourth Circuit held essentially that United's actions were not reasonable under the circumstances as they were "the

Respondents argue that the difference between the federal and state rulings is simply a matter of semantics because there is sufficient criticism of United's actions by the Louisiana courts to satisfy the federal standard. But it is precisely because courts often indulge in hindsight criticism -- or as the Fifth Circuit observed, "the term 'negligence' is plastic in the hands of some courts" (App. G. 182a) -- that the Fifth Circuit made clear that the federal negligence test required the application of several essential components: (1) the burden of proof must be on United's customers to prove United's negligence or greater misconduct in causing its shortage, (2) the allegedly negligent acts must be judged under an objective standard of behavior and must have occurred when curtailments were "reasonably foreseeable and avoidable," and (3) such acts must have "proximately caused" the curtailments. *Id.* at 182a-183a.

> failure to exercise reasonable care -- they were negligent."

The quoted language, for which no citation is provided, *does not appear in the Fourth Circuit opinion.*

In another instance of misleading quotations, the City asserts:

> Nevertheless, United alleges that the Fifth Circuit imposed a three part "federal standard" of negligence .... What United has labeled as a new three-part "federal standard", however, is not only dicta, it is contrary to the Court's assertion that the federal interest is limited to "strict liability or liability without fault."

Br. 14. Again, there is no citation to this last quotation. Although the quotation implies that the Court making such assertion is the Fifth Circuit, the language in fact is taken from the Louisiana Court of Appeal judgment. *See* App. A 18a.

Obviously, these are not meaningless elements or mere afterthoughts by the Fifth Circuit. Rather, they are essential to ensure that federally regulated pipelines will not be subjected to liability for federally regulated curtailments through random fault-finding. Yet, the Louisiana state courts failed to satisfy *any* of these elements.[3]

First, as Respondents concede and then attempt to explain away, the Louisiana Court of Appeal held that any federal interest was relevant only by way of defense and "repeat[ed] that it was United's burden to prove its defenses . . ." App. A at 15a. Under the federal standard, United should not have had the burden of proving it was *not* liable. The burden of proving negligence should have been on the Plaintiffs.

Second, the Louisiana judgment never refers to the element of foreseeability -- a requirement that the Fifth Circuit termed a "necessary element" of the negligence standard. App. G 183a. Moreover it is spurious to contend, as Respondents do, that application of the foreseeability requirement could not have affected the results. It is inconceivable, for example, that the Louisiana Court of Appeal could have found that curtailments that began in 1970 would have been reasonably foreseeable and avoidable when United released some gas reserves in 1962.

Similarly, the Louisiana Court of Appeal never measured United's conduct against a "standard of objective reasonableness." *Id.* Had the court done so, it is extremely doubtful that certain of United's actions held to subject it to liability, such as adding sales commitments certificated by the Commission as

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3 It was clear to the Fifth Circuit that the Louisiana Court of Appeal had not applied the federal standard of liability. The Fifth Circuit's polite, but pointed, rebuke of the Louisiana court's judgment can be found in App. G 181a-182a, n.15 and is discussed in United's petition at 11.

being in the public interest, could have been found "negligent."

Finally, the Louisiana Court of Appeal never undertook the proximate cause analysis required by the Fifth Circuit. Rather, the Louisiana court reasoned that, but for the actions complained of, *e.g.*, the release of reserves and additions of service, United would have had gas available for customers like LP&L and would not have been required to curtail service. No consideration was given to the nationwide shortage of gas -- an event recognized by this Court throughout the 1970's -- and no effort was made to determine whether some portion of United's curtailments was due to these external factors rather than to attribute the curtailments *entirely* to United's own conduct.

Try as they may, Respondents cannot bridge the gap between the federal standard and the liability standards applied by the Louisiana Court of Appeal. The differences are stark and substantial. They cannot be glossed over by reference to "other decisions."[4] Nor should they be ignored because -- as Respondents erroneously suggest -- granting United's petition would somehow require this Court's review of a voluminous

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4 The "decision" of Administrative Law Judge Sherman P. Kimball referred to by Respondents (City Br. 22-23; LP&L Br. 22-23), was the initial decision reviewed by the Commission in Opinion No. 237. In that initial decision, the administrative law judge expressly declined to reach any conclusions on United's negligence or willful misconduct and, to the extent that he made any factual findings relevant to such conclusion (many of which supported United's position), the Commission expressly declined to adopt them. App. E. 127a-129a. As for Judge Gesell's *Texasgulf* decision, it was based on a *different* record between *different* parties, and more importantly, was entered *before* Opinion No. 237 and the Fifth Circuit opinion were issued -- and thus did not apply the federal negligence standard articulated in those opinions.

trial court record.[5] United's petition seeks only a determination that the Louisiana state courts failed to apply the federal legal standard and that they must do so to adjudicate United's alleged liability for curtailments.

2. LP&L further argues that, if the Louisiana Court of Appeal judgment conflicts with the Fifth Circuit's opinion, "the Fifth Circuit must have overstated the case and Opinion No. 237 should be followed, not the Fifth Circuit." Br. 20, n.44. The authority for this contention is that "Louisiana law is that United States Supreme Court decisions on federal issues are binding authority, but lower federal court decisions are merely persuasive." *Id.*, citation omitted.

LP&L's contentions demonstrate the need for this Court to make clear that final federal appellate court affirmations of agency orders are not merely persuasive, but are binding authority. Even assuming *arguendo* that the Louisiana courts believed that the Fifth Circuit decision "overstated the case," they cannot be allowed the option of ignoring that decision and following instead their own construction of the federal agency's order. Pet. 12. If the Supreme Court of Louisiana concurred in LP&L's argument (which was presented to it) and declined to follow the Fifth Circuit's decision on this ground, then it has flouted the exclusive statutory review procedures under the NGA and raised a matter of significant federal concern that should be addressed by this Court.

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5 Ironically, while Respondents admonish this Court to refrain from reviewing the factual record, they attempt to reargue the case presented to the trial court. The most egregious example is the LPSC's devotion of nearly half its brief (pp. 13-25) -- without once quoting or even citing to the Louisiana Court of Appeal's decision -- to its contentions selectively drawn from the 42,000-page record that is not before this Court. These contentions merely show that these hotly disputed factual contentions need to be resolved in the context of the federal negligence standard rather than under the amorphous standards applied by the Louisiana courts.

3. Finally, a review of the matters at issue belies the Respondents' contention that any conflict between the federal and state court decisions is unimportant.

First, even if the only harm resulting from the Louisiana courts' failure to apply the federal standard were the erroneous imposition of a $180 million judgment against United, the appropriate relief under such circumstances would be summary reversal -- not denial of certiorari. This result would permit United to receive a fair trial under proper standards of liability.

But the federal/state conflict here has importance beyond United and the Respondents. As discussed above, the conflict implicates the statutory review scheme under the Natural Gas Act and comparable legislation by questioning whether certain federal appellate decisions affirming agency orders are binding on state courts. The conflict also involves state contravention of a valid and final federal agency order, which raises the question of whether federal interests and policies in the regulation of natural gas pipelines are being undercut. *See generally* Pet. 13-20. *See also* Brief of Interstate Natural Gas Association of America as Amicus Curiae ("INGAA Br.") 7-10.

The Respondents attempt to denigrate the conflict's importance by asserting that "the natural gas pipeline industry has fundamentally changed" (LP&L Br. 15; City Br. 25), and that the "problem confronting pipelines today is not how to allocate insufficient gas supplies, but rather what to do with excess gas supplies." (City Br. 25.) Ironically, pipelines currently attempting to deal with "excess gas supplies" are releasing reserves -- the very conduct placed in jeopardy by the Louisiana judgment. As discussed in the petition, pp. 25-26 and in the INGAA brief, pp. 9-10, the Louisiana Court of Appeal's reasoning poses a real and current dilemma for pipelines: will they be held liable in the future for their current releases even if the releases are based on reasonable business judgments under today's conditions?

Despite Respondents' effort to suggest that changes in the industry have made this case less important, the inescapable fact is that United and other interstate pipelines are still heavily subject to Commission regulation -- both in time of shortage and in time of surplus -- and most of their supply management decisions will remain subject to Commission scrutiny. Pipelines will also continue to be subject to claims brought in various courts as a result of those decisions. Thus, the Commission has a continuing and substantial interest in the efficacy of its orders, as made final by the exclusive review procedures of the Natural Gas Act, and in ensuring that various state courts are not free to ignore those orders or to impose liability in a manner significantly different from that mandated by the Commission.[6]

For the reasons set out in United's petition for a writ of certiorari and in this reply memorandum, the petition should be granted.

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6 If there is any doubt that the Louisiana courts' failure to follow the Commission's liability standard adversely affects federal interests, United respectfully suggests that the Court request the Commission's views.

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